

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON**

PATRICK FLEETWOOD ET AL,

Plaintiffs,

v.

WASHINGTON STATE  
UNIVERSITY,

Defendant.

**NO. 2:20-CV-00355-SAB**

PLAINTIFFS' MOTION TO  
REMAND

11/25/2020 6:30 PM

WITHOUT ORAL  
ARGUMENT

**I. INTRODUCTION & SUMMARY OF ARGUMENT**

Defendant's removal is classic example of a litigant attempting to have its cake and eat it too. For while Defendant can remove (most of) Plaintiff's case to this Court it cannot (as it attempts to do here) reserve its Eleventh Amendment immunity defense. (ECF No. 1, pg. 3, ¶8) Accordingly, the Court should remand the case to state court given Defendant's refusal to waive its Eleventh Amendment

1 defense as allowing it prosecute its defense in this Court would confer WSU with an  
2 improper tactical advantage.

3 Alternatively, the Court should remand the Washington State Administrative  
4 Procedures Act (APA) to the Whitman County Superior Court as that matter has  
5 been briefed at the state court level, is ready for consideration, and it is unclear  
6 whether a federal court has jurisdiction over a state law APA matter.  
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## 8 II. ARGUMENT

### 9 A. Defendant waived its Sovereign Immunity defenses.

10 Defendant contends its removal does not waive its sovereign immunity  
11 defenses. (ECF No. 1, pg. 3, ¶8) Defendant is incorrect because “a State may waive  
12 its sovereign immunity by consenting to suit.” *In re Lazar*, 237 F.3d 967, 976 (9th  
13 Cir. 2001)(citing *College Sav. Bank v. Florida Prepaid Postsecondary Educ.*  
14 *Expense Bd.*, 119 S. Ct. 2219, 2223 (1999); *Clark v. Barnard*, 108 U.S. 436, 447–  
15 48 (1883)). A state consents to a suit when it voluntarily invokes federal  
16 jurisdiction. *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007).  
17 When a state voluntarily invokes federal jurisdiction (like it has done here) it waives  
18 sovereign immunity because holding otherwise would allow the state the unfair  
19 tactical advantage removing the case to federal court and then dismissing the case  
20 on sovereign immunity grounds. *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*,  
21 535 U.S. 613, 614 (2002).  
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1 Since Defendant has removed the case but has not waived sovereign  
2 immunity the Court should remand this case to state court so as to deprive the  
3 Defendant of the tactical advantage it seeks.

4 **B. The APA claim should be remanded.**

5 Plaintiff pleads an RCW 34.05 Administrative Procedures Act (APA) claim  
6 against the State of Washington. (ECF No. 1-2, §III – Count One – Violation of the  
7 Washington Administrative Procedure Act) The APA allows “Washington state  
8 courts...to review [a state agency’s] adjudications.” *Phillips 66 Co. v. Sacks*, 409  
9 F. Supp. 3d 972, 990–91 (W.D. Wn. 2019). The APA process involves the state  
10 agency (here WSU) making a final agency decision and the aggrieved party (here  
11 Fleetwood) timely appealing the agency’s decision to a superior court. RCW  
12 34.05.510. Thereafter the superior court reviews the agency’s decision as if it is  
13 sitting in an appellate capacity. RCW 34.05.570.

14 Here WSU issued a final agency decision adverse to Fleetwood. (ECF No. 5,  
15 PGID 154 *citing* 2/21/2020 Appeals Board Decision) Fleetwood timely appealed  
16 that action to the Whitman County Superior Court. (ECF No. 5, PGID 99 *citing*  
17 Civil Case Cover Sheet filed 3/13/2020) The Whitman County Superior Court then  
18 issued a briefing schedule as to the APA issue. (ECF No. 5, PGID 192-193 *citing*  
19 5/12/2020 Administrative Scheduling Order) All briefing in the APA matter is  
20 complete. (ECF No. 5, PGID 544 – 577, 708 – 730, 769 - 788 *citing* 7/30/2020  
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1 Fleetwood's Opening Brief; 9/21/2020 Defendant's Response Brief; 10/7/2020  
2 Fleetwood's Reply Brief)

3 Since the APA matter has been briefed<sup>1</sup> authority exists under *Younger v.*  
4 *Harris* to remand this claim to the Whitman County Superior Court. The *Younger*  
5 doctrine "forbids federal courts from staying or enjoining pending state court  
6 proceedings" and exists, in part, to "avoid federal court interference with uniquely  
7 state interests such as preservation of these states' peculiar statutes, schemes, and  
8 procedures." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1150 (9th Cir.  
9 2007); *Younger v. Harris*, 401 U.S. 37, 41 (1971). The "*Younger* abstention is  
10 appropriate only when the state proceedings: (1) are ongoing, (2) are quasi-criminal  
11 enforcement actions or involve a state's interest in enforcing the orders and  
12 judgments of its courts, (3) implicate an important state interest, and (4) allow  
13 litigants to raise federal challenges." *Phillips 66*, 409 F. Supp. 3d at 993. Once the  
14 court undertakes that four-part test it determines the practical effect of enjoining the  
15 state court proceedings and whether a *Younger* exception applies. *Phillips*, 409 F.  
16 Supp. 3d at 993.

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22 <sup>1</sup> Not only has the APA matter been briefed, but it was subject to an unsuccessful  
23 motion to dismiss at the state court level. (ECF No. 5, PGID 190-191 *citing* 5/7/2020  
24 Order Denying Motion to Dismiss)  
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1 Regarding point (1), the APA action regarding Fleetwood and WSU is  
2 ongoing. The matter has been fully briefed with the petition for review being filed  
3 but awaiting oral argument and a final decision. Regarding point (2), “quasi-  
4 criminal enforcement actions...are characteristically initiated to sanction the federal  
5 plaintiff, *i.e.*, the party challenging the state action, for some wrongful act.”  
6 *Phillips*, 409 F. Supp. 3d at 994. Here WSU found Plaintiff at fault for violating  
7 WSU Executive Policy 15, a finding that resulted in Fleetwood receiving sanctions  
8 from WSU as well as loss of his ROTC scholarship. (ECF No. 5 PGID 429-430  
9 *citing* 12/16/2019 EP 15 violation letter) Regarding point (3), the APA matter  
10 involves the important state interest of regulating student conduct at the State’s  
11 universities. *See id.* Regarding point (4), there is nothing preventing WSU from  
12 asserting any federal arguments in the state court action. Indeed, the APA allows  
13 the superior court to determine whether an agency action was unconstitutional.  
14 RCW 34.05.570(4)(c)(i).

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16 Since Fleetwood satisfies points (1) – (4) the Court must assess the practical  
17 effect of applying *Younger* and determine if exceptions to that doctrine exist. Such  
18 exceptions are narrowly construed and require a showing of bad faith, harassment  
19 or some other extreme circumstance. *Phillips*, 409 F. Supp.3d at 996 (citation  
20 omitted). The practical effect of applying *Younger* here would be to allow  
21 Fleetwood to get resolution on the APA matter that has been fully briefed and  
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1 awaiting oral argument and a decision. Further, Fleetwood's request that the APA  
2 claim be remanded under *Younger* is not brought in bad faith or for the purpose of  
3 harassing WSU.

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5 **III. CONCLUSION**

6 Plaintiff's motion should be granted.

7 DATED this October 26, 2020.

8 s/ Matt Crotty

9 Matthew Z. Crotty, WSBA 39284

10 Crotty & Son Law Firm, PLLC

11 905 W. Riverside Ave. Ste. 404

12 Spokane, WA 99201

13 Telephone: 509-850-7011  
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**CERTIFICATE OF SERVICE**

I certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties, if any, shall be served in accordance with the Federal Rules of Civil Procedure.

Dated this October 26, 2020.

*/s Matthew Crotty*  
MATTHEW Z. CROTTY  
Crotty & Son Law Firm, PLLC  
905 West Riverside, Suite 404  
Spokane, WA 99201  
Telephone: 509.850.7011